

Merlin is not trying to suggest that controlling LLC members, general partners, or officers and directors of corporations be exempt from affiliation rules, it is merely trying to establish that an applicant whose equity is widely held will not have to concentrate more than 50% of its equity into the hands of a few controlling principals. Clearly, Merlin supports the Commission's ability to scrutinize each applicant to ensure that *de facto* control rests in the hands of the managing members in an LLC, the designated partners in a general or limited partnership, or the officers and directors of a corporate applicant.

In the alternative, if the FCC needs to set thresholds, it should only require that the controlling principals hold 20 percent of the equity of an applicant, but also require that no other investor could hold more than 10% of the applicant, in a widely held company. Thus, the controlling principals will hold twice as much equity as any other investor, a measure which will help to ensure that the controlling principals have *de facto* and *de jure* control. Yet, it will allow businesses the flexibility to use new forms of business organization to meet the needs of the modern marketplace. Additionally, this proposed rule will make it possible for an applicant to bring in additional equity investment so that it can increase its capital if it wins a license at auction.

D. COMMENTS ON THE INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

1. Comments on projected reporting and compliance requirements.

To the extent that the proposed rules streamline the auctions process, and make it easier for smaller companies to participate in auctions for spectrum-based services, Merlin generally supports the Commission's proposals. However, as enumerated below, some of the proposals have a disproportionately harmful effect on small businesses, and those proposals should be abandoned by the FCC.

For example, the FCC considers adopting a rule regarding the pre-qualification or screening of auction applicants who may wish to use installment payments. The FCC has not set forth any guidance regarding the additional reporting requirements that this potential rule would impose. Since small businesses are currently the only parties which could be affected by this rule, and since only entrepreneurs and small businesses have received the benefits of installment payments, this rule should not be written in such a way as to impose an extraordinary reporting requirement which has not been previously imposed. The FCC should also not impose any additional fee on small business applicants as a result of this proposed rule as that would have a significant adverse effect on the participation of small businesses in the auction process.

In the *NPRM*, the FCC also considered amending its affiliation rules. The proposed rules have not actually been outlined with any specificity, however. The Commission is

considering whether to count as affiliates companies which have *previously* been in business with current applicants. This new definition of affiliate would cause small businesses to have to keep far more extensive records on which companies they have engaged in business with over a longer period of time. To continue to qualify as small businesses, they will face a much stiffer burden of proof. The Commission has not demonstrated any reason why it is considering including past affiliates in its proposed new definition nor has Merlin been able to determine the rationale for this proposal. Because the proposal would be unduly burdensome and erect barriers to entry by small businesses, it should not be further considered.

2. There are numerous alternatives that would minimize the significant economic impact on small entities.

The *NPRM* seeks comment on changes to the FCC's auction rules which offer benefits to "designated entity" applicants. Section 309(j) of the Communications Act includes small businesses among the entities designated to receive the benefits. 47 U.S.C. §§ 309(j)(3), (4). The FCC is proposing to lower the financial caps which permit small businesses to take advantage of its special benefits. In lowering the financial caps, the FCC would not only limit the number of small businesses which would be eligible for those benefits, it would also place those small businesses at a greater disadvantage with respect to the existing larger telecommunications providers currently dominating the industry. The FCC would be increasing the barriers to entry that small businesses face. The FCC's proposals to lessen bidding credits, raise the interest rate on installment payments, raise down payments, and perhaps eliminate installment payments, all have a significant negative impact on the ability of small businesses to compete effectively in the telecommunications industry. The FCC has

not shown that it has significant interests which will be served by placing these additional burdens on small businesses. This is particularly true with respect to raising the rate of interest on installment payments, which will raise costs to small businesses substantially, without any reasoned justification other than that the previous rates were a good deal for small businesses. Accordingly, Merlin considers this proposed change arbitrary and capricious and submits that the Commission should no longer consider it.

The Commission is considering whether to require all auction winners to pay their second down payment when it is ready to grant the first licenses after an auction. This proposal would require down payments regardless of whether an applicant has a petition to deny pending against its application which would delay its license grant. This proposal would have serious consequences for small businesses. Smaller businesses have traditionally lacked easy access to capital which enables them to enter new businesses. Under the current rules, when the second down payment is not made until the license is granted, a small business makes a large capital deposit when it holds the license in hand, a situation which gives greater reassurance to the commercial lending community which provides the capital for the second down payment. Even loan commitment letters, the traditional means an applicant used to demonstrate its financial qualification to hold a license, did not have to be exercised until after licenses were granted. The proposed rule will increase the rate of defaults among small businesses, without any good cause. It will shut smaller businesses out of spectrum-based services because of defaults only because smaller businesses have fewer resources to rely on to access capital. The only hints the FCC gives for justifying these changes are that it would

avoid inequities resulting from different payment dates and that it is administratively convenient. *NPRM* at para. 65. The FCC does not explain what the inequities are, and administrative convenience is a poor justification for imposing this burden on small businesses. *NPRM* at 65.

Finally, the Commission requests comment on the issue of cross defaults, where if a licensee defaults on one installment payment loan, it would also default on any other installment payment loan. This possible change in the rules could only harm small businesses, because only small businesses use installment payments. While the FCC states that cross-default provisions are standard in credit-related agreements, *NPRM* at para. 76, it proposes no theory regarding how the rule change would serve the public interest or promote the interests of licensees. Without a reasoned purpose, the FCC should not impose this burden on small businesses.

III. CONCLUSION

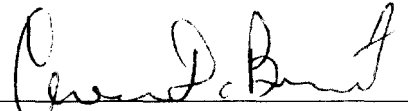
Congress recognized that competitive forces will enhance the range of wireless services and lower the price of wireless services available to the public if new companies are able to participate in offering these new spectrum-based services. For that reason, it required the FCC to ensure that small businesses and other designated entities would be given benefits which would allow those entities to participate in the provision of services where the licenses were auctioned. Historically, small business entry into the telecommunications industry has been rare because of the high capital requirements of the industry combined with the

difficulty small businesses have faced in accessing capital. If the Commission adopts the proposals set forth in the *NPRM*, small businesses will face increasing barriers to their participation in offering wireless services, and the Commission will have failed to accomplish the goal that Congress has set.

Accordingly, Merlin respectfully requests that the Commission adopt the proposals set forth herein.

Respectfully submitted,

MERLIN TELECOM, INC.

A handwritten signature in black ink, appearing to read 'Caressa D. Bennet', is written over a horizontal line.

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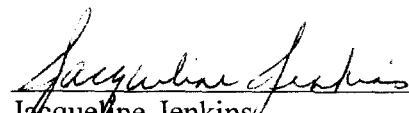
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